

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition for
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)
**(FCC Triennial Review
Nine-Month Phase)**

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION OF VERIZON TO STAY PROCEEDING**

On March 3, 2004, Verizon California (Verizon) filed a motion asking the California Public Utilities Commission (Commission) to immediately stay further proceedings pursuant to the FCC Triennial Review Order (TRO), in light of the recent ruling by the United States Court of Appeals for the District of Columbia Circuit in United States Telecom Association v. Federal Communications Commission, No. 00-1012 (decided March 2, 2004) (Opinion). Responses to Verizon's motion were filed on March 8, 2004. Verizon was granted leave to file a third-round reply to responses on March 9, 2004. By this ruling, the motion for a stay is denied, as discussed below.

Position of Verizon

Verizon argues that an immediate stay of proceedings in the nine-month TRO case is warranted based on the claim that the Circuit Opinion "invalidates both the FCC's delegation of authority to determine whether CLECs are

impaired without access to unbundled elements and the substantive tests that the FCC promulgated for making such determinations.” (Verizon Motion at 1.)

Verizon argues that the Circuit Opinion applies to all elements of the TRO impairment case presently before this Commission and also vacated the FCC’s underlying nationwide impairment standards for mass market switching and the dedicated transport elements (DS1, DS3 and dark fiber). The Court remanded those standards to the FCC for further examination and revision in conformance with the Opinion.¹ Verizon claims that even if the states’ delegated authority to act were not vacated, the standards underlying the state cases have been invalidated. Verizon thus argues that continuing the TRO proceeding in view of the Circuit Opinion would be inefficient.

Although the Court stayed its vacatur (i.e., delayed issuance of its mandate) until the *later* of (1) the denial of any petition for rehearing or rehearing en banc, or (2) 60 days from March 2, 2004, Verizon argues that it would be wasteful and imprudent to continue this proceeding while waiting for further disposition of the stay. Verizon thus asks the Commission to immediately stay further proceedings in this docket for a minimum of 60 days, or at least until such time as it is “clear whether there will be any continuing role for the states” (Verizon Motion at 3) following a determination on remand by the FCC.

Position of Parties in Support of the Motion

Comments in support of the motion were filed by SBC California and the California Small Business Association (CSBA) and California Small Business Roundtable (CSBRT). SBC agrees with Verizon that the TRO proceeding should

¹ Slip Op. at 22, 28 and 61.

be stayed. SBC argues that in view of the Opinion, it would serve no useful purpose for the Commission to continue with this proceeding before the FCC formulates new unbundling rules. SBC thus advocates suspending the proceeding until disposition of any petition for rehearing of the Opinion, and scheduling a “status hearing” to be held in 60-90 days to address what, if any, further steps are appropriate. CSBRT likewise argues that the Circuit Opinion creates considerable doubt whether state commissions may proceed and, if so, how they should proceed. Under these circumstances, CSBRT believes it would be inefficient to proceed.

Position of Parties Opposed to the Motion

Comments in opposition to the motion were filed by MCI, CALTEL, jointly by AT&T Communications of California Inc., Sprint Communications Company LP, Covad Communications Company, the Pure UNE-P CLEC Coalition, and jointly by the Office of Ratepayer Advocates, and The Utility Reform Network.

Parties opposed to Verizon’s Motion argue that the TRO proceeding should continue to move forward under its current schedule because (1) Verizon’s Motion is untimely and unripe, (2) the Opinion does not end this Commission’s obligations under the TRO, (3) staying this proceeding would only waste the effort already spent to build the record, and (4) that the Commission should continue its fact-finding process regardless of the disposition of the stay and appeal process.

Opponents of the Verizon motion also note that the Circuit Opinion did not vacate all TRO provisions. Specifically, with respect to the nine-month proceeding, the Opinion did not vacate the requirement for continuing analysis to develop a batch hot cut process capable of handling the volumes of hot cuts

necessary to migrate customers between carriers if CLECs lose access to unbundled switching.

MCI argues, moreover, that continuing the TRO proceeding ensures marketplace stability by foreclosing efforts already being made by the ILECs to discontinue offering certain UNEs, even though the FCC and this Commission have not yet completed their analysis of CLEC impairment without access to such UNEs. MCI asks the Commission to keep this proceeding moving to preserve the progress that has already been made in opening the local market to competition.

Discussion

Ripeness of the Motion

A threshold issue is whether the Verizon motion is ripe. Parties disagree as to the timeliness and ripeness of Verizon's motion in view of the stay ordered by the Court and the likelihood of legal challenges to the Circuit Opinion. Verizon claims that its motion for a stay is ripe for immediate action, on the basis that the Opinion invalidated the provisions of the TRO relating to the nine-month review. SBC supports this claim.

Verizon claims that the 9-month TRO schedule is no longer binding given the Circuit Opinion. Verizon argues that if the underlying TRO process is invalid, so too is the deadline by which that process must be completed. Verizon argues that the "common-sense legal principle of tolling" (as in "tolling" of the statute of limitations) would support a restart or extension of the nine-month deadline by a like period in the event the Opinion is stayed or overturned. (Verizon Reply to Responses at 2.)

Parties in opposition argue that Verizon's Motion is untimely and unripe in view of the stay of the Opinion issued by the Circuit Court. Although the

Opinion vacates certain provisions of the TRO, parties note that it expressly imposes a stay until the later of 60 days or the disposition of legal appeals, its vacatur of the TRO is stayed. Neither the Circuit Court nor the FCC have acted to order a halt to the state-mandated TRO proceedings.

In view of the stay, it is concluded that the requirements of the TRO inquiry concerning CLECs impairment without access to unbundled switching for mass market consumers and high capacity loops and transport from the ILECs remain binding on this Commission at least as long as the stay remains in effect. Halting the proceeding at this point would conflict with this Commission's continuing obligations to finish this proceeding within nine months, and would virtually ensure that the Commission could not meet the deadline imposed by the TRO.²

Verizon and SBC claim that the Opinion became governing law the moment it issued even though the Court issued a temporary stay of the vacatur. SBC cites a portion of Ninth Circuit pronouncement for its claim that "once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court," and claiming that it rejected the argument that appellate decisions are "not binding precedent until the mandate issues in th[e] case." *Chambers v. United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994), *vacated and remanded on other grounds*, 47 F.3d 1015 (9th Cir. 1995). SBC also cites *Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) which stated in part that "once a federal circuit court issues a decision, the district courts within that

² See e.g., *TRO*, ¶ 190.

circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority."

The legal citations offered by SBC, however, do not apply to the actions of the Circuit Opinion at issue here.³ In this case, unlike the cases cited by SBC, the Circuit Court, itself, has issued a stay of its own opinion. There is no need in this case to await a ruling from a reviewing court to resolve the question of whether a stay of the Circuit Opinion will be issued. The stay has already been issued as an integral part of the Circuit Opinion, itself.

The Circuit Opinion expressly prescribes that its holdings are stayed until the later of 60 days or disposition of any motions on appeal. In recognition of the Opinion as governing law, recognition must also be given to the stay of the vacatur. Until or unless the stay of the vacatur is lifted, the TRO remains in effect and this Commission remains bound by it. Indeed, by staying its mandate until disposition of petitions for rehearing, the Court recognized that it could subsequently modify its Opinion. It is not reasonable to start making immediate changes in direction in response to a Court Opinion that is stayed and that may subsequently be modified on rehearing.

Until or unless the FCC acts to suspend or delay the schedule for state-mandated TRO proceedings, or until or unless legal appeals are resolved, the Verizon motion remains, at best, premature. On that basis alone, there are sufficient grounds to deny Verizon's motion to immediately halt the progress of the TRO proceeding.

³ Moreover, in the Chambers case cited by SBC, the Court vacated its opinion. 47 F.3d 1015; 1995 U.S. App. LEXIS 3176, Ninth Circuit, February 21, 1995.

Efficiencies of Continuing Versus Deferring the Proceeding

For the sake of argument, even assuming that the Circuit Opinion's stay left Commission discretion not to continue the TRO proceedings, the question would remain as to whether any presumed advantages of immediately stopping all work outweigh the net advantages of keeping the proceeding on its present schedule. On balance, we conclude that the most efficient course of action is to stay the course with the current proceeding schedule.

Even if the Circuit Opinion were ultimately upheld, the FCC would still be required to promulgate new rules for impairment determinations. In such a case, the extensive record already created in this proceeding would be valuable even if only on an advisory basis for applying any revised FCC impairment standard. To the extent that the FCC may add components to its impairment standard, the Commission and parties could address such additions, as warranted, via a limited reopening of the record.

A weighing of relative advantages favors keeping the TRO on schedule, particularly in view of the advanced stage of the proceeding. If the Verizon motion had come prior to the expenditure of resources to prepare testimony and conduct evidentiary hearings, a much greater potential savings of resources would have been at issue. Instead, a major portion of the TRO work effort has already been completed. Any savings would be limited mainly to the party's remaining work preparing briefs and the Commission's deliberations and preparation of a decision. Under the current schedule, opening briefs are due on March 26, and reply briefs on April 14, 2004. The Issue Comparison Exhibit is due on April 1, 2004. Given the approach of these dates, any incremental savings would be more than offset by the potential loss in efficiencies from suspending progress in the work already completed.

SBC argues that if the proceeding is temporarily stayed and later resumed on appeal, the Commission and parties “can easily pick up right where the proceedings left off and go forward from there...” (SBC Response at 7). We disagree. As noted by opposing parties, any significant hibernation in the proceeding increases the chances that scarce Commission and party personnel and resources assigned to this proceeding would be diverted to other pressing needs in the meantime. Depending on how much time had passed, it would become increasingly difficult to reassemble the same group that helped create the record, increasing the risk that the full value of the record would not be extracted and used by the Commission. As CalTel observes, consolidation of the record through the briefing process is most efficiently done immediately after hearings are concluded, and becomes more problematic as the time between close of hearings and briefing lengthens. Such concerns are particularly relevant here given the unusual complexity and magnitude of the record evidence at issue.

Although the stay is imposed for at least 60 days, it could last for a longer period given prospects for legal appeals. A majority of FCC Commissioners has directed the FCC’s general counsel to pursue a stay of the Opinion, and to file an appeal to the U.S. Supreme Court. In addition, there are indications that various other parties plan to seek Supreme Court review. The longer the stay remains in effect, the more problematic it would become to restart the proceeding without significant delays and inefficiencies.

In addition to the time required for participants to reacquaint themselves with the record, an extended delay could raise concerns that the record had grown stale with the passage of time, and more resources would be required to update the record. For all of these reasons, and particularly in view of the work already completed compared to that yet to be done, the choice weighs in favor of

staying the course to completion within the mandated 9-month TRO schedule. Once the disposition of the Circuit Opinion appeals are resolved, the Commission could then consider whether a further evaluation of the TRO schedule was warranted based on conditions in effect at that time.

Mandate to Proceed With Portions of Order Not Vacated

Aside from any effects of the stay of the vacatur, the Commission still must comply with the remaining relevant portions of the TRO that were not vacated. This includes the requirement to approve a hot cut process capable of handling the volumes needed to migrate customers among carriers' facilities if CLECs lose access to unbundled switching. The Commission must complete these tasks within the nine-month period provided in the TRO.⁴

Verizon does not oppose conducting the Commission's scheduled March 22, 2004 Collaborative Workshop on Performance Measures for Batch Hot Cuts. Moreover, although Verizon's motion does not speak to this issue, MCI argues that the Commission should continue the hot cut portion of this proceeding to a final decision by the Commission (even if the Commission otherwise halted or delayed other portions of the proceeding). We agree. The Circuit Opinion does not alter the need to establish a hot cut process capable of handling the entire volume of customer migrations among carriers if CLECs lose access to UNE switching, apart from its vacatur of other TRO provisions.

Conclusion

In view of all the considerations set forth above, the motion of Verizon to stay the TRO proceeding is denied as ordered below.

⁴ See e.g., *TRO*, ¶ 190.

IT IS RULED that

1. The motion of Verizon California to stay the proceeding is denied.
2. Until or unless the stay of the vacatur of the Triennial Review Order is lifted and, unless and until the Federal Communications Commission or a court of competent jurisdiction instructs the Commission otherwise, this proceeding shall continue under the currently adopted schedule.
3. Once the stay of the Circuit Opinion is lifted and legal appeals relating to the Circuit Opinion are resolved, the Commission will entertain motions, as warranted, concerning subsequent disposition of further TRO proceedings based on conditions at that time.

Dated March 16, 2004 in San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion of Verizon to Stay Proceeding on all parties of record in this proceeding or their attorneys of record.

Dated March 16, 2004, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

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